

Modern Heating and Cooling and Jeff Waatti in the Keweenaw County Circuit Court action referenced by Triangle Tube in its motion to show cause.

2. That counsel for Triangle Tube files its motion with the improper goal of prohibiting Dr. Cuzzillo from testifying against Triangle Tube in any state or federal court including, but not limited to the Keweenaw County Circuit Court case of *Mathews v Triangle Tube*.

3. That there is no legal or factual basis for such a request under the circumstances, rulings, and stipulated orders of *Mathews v Triangle Tube* case.

4. That further, counsel for Triangle Tube has agreed that discovery produced by Triangle Tube in the *Herrera* matter is also discoverable in the *Mathews* matter provided the *Herrera* "confidential" label is removed. Counsel for Triangle Tube, in the *Mathews* matter absolutely concedes that a document being labeled *Herrera* "confidential" does not bar that document from being discovered in the *Mathews* matter. Please reference Exhibit A attached, the April 18, 2019, hearing on motion to compel discovery transcript argued before the Honorable Judge Goodman on April 18, 2019, at pages 27-29.

5. That furthermore, upon review of Triangle Tube's motion to show cause pending before this court, it appears that Triangle Tube has failed to produce the order resulting from that hearing of April 18, 2019, wherein it is ordered that "the protective order entered in the *Herrera et al Buckingham et al* US District Court file number 15-CV-128-NDF, shall not be a bar, defense or exception to the Plaintiff and co-Defendant obtaining discovery from Triangle Tube in this subject litigation." Furthermore, Triangle Tube was ordered and Triangle Tube agreed to produce the deposition transcript of Michael Senk from the *Herrera* case. See Exhibit B attached.

6. That the undersigned does not in any way criticize the Wyoming Court *Herrera* protective orders.

7. That it is unjust for Triangle Tube to rely upon the impressions, testimony and transcript of Michael Senk from the *Herrera* matter in the *Mathews* matter and still attempt to sanction Dr. Bernard Cuzzillo by ordering that he cannot testify in the *Mathews* matter as a result of the mental impressions that he formed in the *Herrera* matter.

8. That the Wyoming Court protective order in *Herrera* does not demand that Dr. Cuzzillo "cleanse his mind" of information he gained as an expert in the *Herrera* matter, or any other matter. That upon information and belief, Dr. Cuzzillo has purchased an Exemplar Triangle Tube boiler and conducted testing on that boiler utilizing his own thought processes. Again, the protective order in the Wyoming matter does not require that Dr. Cuzzillo "cleanse his mind".

Turning specifically to some of the factual claims in Triangle Tube's motion, it is broadly alleged that Mr. Cuzzillo is in violation of the court's protective order by using confidential information and discovery material, however, upon review of the *Mathews* court order at Exhibit B, and Exhibit C to which Triangle Tube counsel agreed, the *Herrera* protective order is not in any way to be a bar in the *Mathews* matter.

9. That turning to the factual allegation contained in the motion of paragraph 10, there is also no articulated basis for this claim, and again, Triangle Tube in the spirit of open Michigan discovery, is bound by the order found at Exhibit B.

10. That turning to paragraph 13 in the motion, Triangle Tube moved for a reaffirming protective order possibly due to the fact that Triangle Tube had left many items public on the

federal court PACER website. It further appears likely that the reaffirming protective order was obtained without notice to any of the litigants in the *Herrera* or the *Mathews* matters.

11. That paragraph 18 of the motion absolutely disregards the impact of the *Mathews* court order at Exhibit B, which was agreed to by counsel for Triangle Tube at Exhibit C.

12. That paragraph 19 of the motion to show cause demonstrates Triangle Tube's ill-founded attempt to morph a protective order concerning *Herrera* documents into an order that would muzzle all experts that were involved in the *Herrera* matter with the exception of Triangle Tube's experts. Neither the original protective order nor the reaffirming protective order of May 19, 2019, can be read so broadly. Again, there is no requirement that Dr. Cuzzillo or anyone else "cleanse their mind". This effort is clearly demonstrated by the complaint that Cuzzillo claims that his expertise learned in the *Herrera* case is applicable to the *Mathews* matter with the conclusion being that Dr. Cuzzillo cannot testify in *Mathews*.

13. That counsel for Triangle Tube, on July 23, 2019, in open court, agreed to the order at Exhibit B which provided that the protective order entered in *Herrera* shall not be a bar, defense or exception to the Plaintiff and co-Defendant obtaining discovery from Triangle Tube in this subject litigation.

14. That counsel's agreement is found at page 65 line 9 of the July 23, 2019, hearing, several months after Triangle Tube approached this court for a reaffirming protective order, on May 19, 2019.

15. It should be noted that counsel for Triangle Tube does not include the Exhibit B, order in this instant motion to show cause. Dr. Cuzzillo testified in *Mathews* after the July 29, 2019 order. Dr. Cuzzillo testified based upon his own mental impressions, and the declarations

and affidavits referred to in the instant motion to show cause were in the public domain available on PACER.

16. That paragraphs 21-25 of the motion to show cause are clearly inconsistent with Triangle Tube's agreement to the July 29, 2019, order found at Exhibit B of this affidavit.

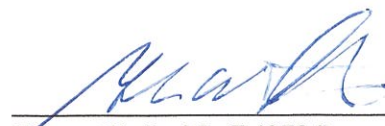
17. That Triangle Tube is simply attempting to do an "end-run" around its previously agreed upon order of July 19, 2019 at Exhibit B in an attempt to muzzle a contrary witness.

18. That Triangle Tube, in essence, is attempting to not simply protect business documents, but instead is attempting to scrub the mental impressions of individuals like Dr. Cuzzillo, who would be in a position to testify critically against Triangle Tube for all matters subsequent to *Herrera*. There is absolutely no legal basis for such an effort. The *Mathews* court further clarified the *Hererra/Mathews* issue at the July 23, 2019, hearing at page 46 to 53. See Exhibit D.

19. That the Keweenaw County Circuit Court judge in *Mathews* appropriately refuses to muzzle any witness that has formed mental impressions and opinions based on past professional experiences and observations. As a result of Triangle Tube's inability to have Dr. Cuzzillo muzzled in Keweenaw County Circuit Court, Triangle Tube is now inappropriately coming back to this court in an attempt to unfairly muzzle Dr. Cuzzillo with the inappropriate and inapplicable use of the protective orders.

Further, Affiant sayeth not.

Dated: January 6, 2020



Glenn W. Smith (P42704)

Attorney for Defendants, Nakkula & Waatti
BENSINGER, COTANT & MENKES, P.C.

122 W. Bluff Street

Marquette, MI 49855

(906) 225-1000/0818 (F)

gws@bcma.net

Subscribed and sworn to before me on this
6th day of January, 2020.



Notary Public -

County of MARQUETTE

State of Michigan

My commission expires: 4/12/24

COPY

Exhibit A

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KEWEENAW

MARY L. MATHEWS, individually,
and as Personal Representative
of the Estate of WILLIAM H.
FRABOTTA, deceased,

E-MAILED Bernie
6-13-19

Plaintiff,

File No. 17-775-NO

-vs

Hon. Charles R. Goodman

DOUGLAS NAKKULA d/b/a MODERN
HEATING & COOLING, JEFF WAATTI,
and TRIANGLE TUBE,

Defendants. /

HEARING ON MOTION TO COMPEL DISCOVERY

BEFORE THE HONORABLE CHARLES R. GOODMAN, CIRCUIT JUDGE

Eagle River, Michigan, Thursday, April 18, 2019

APPEARANCES:

For Plaintiff:

PHILLIP B. TOUTANT, P72992
105 Meeske Avenue
Marquette, Michigan 49855
906-226-2580

For Defendant:

GLENN W. SMITH, P42704
122 W. Bluff Street
Marquette, Michigan 49855
(906) 225-1000 - For Nakkula & Waatti

For Defendant:

JOSEPH P. MCGILL, P43770
38777 Six Mile Road, Suite 300
Livonia, Michigan 48152
(734) 742-1825 - For Triangle Tube

RECORDED BY:

PAMELA L. BEGGS, CER-4072

TRANSCRIBED BY:

KATHLEEN B. VETTORI, CER-2517
Certified Electronic Recorder
P. O. Box 386
Hancock, Michigan 49930
(906) 482-5487

1 Triangle Tube documents that were stamped "confidential and
2 privileged" with a Bates number and produced in a case in
3 Wyoming, they are not to be produced in this case. If
4 there's the same identical document that's responsive to
5 your Order in October--

6 THE COURT: Let me ask--

7 MR. MCGILL: --those documents have been
8 produced already.

9 THE COURT: Before we go on, are you saying that
10 because a group of lawyers got together in Wyoming and
11 agreed to or stipulated to have an Order entered which
12 would cause certain documents never to be in any other
13 jurisdiction ever seen by the light of day, that that's
14 binding on the 12th Circuit or any other Court in this
15 Country? In other words, a group of lawyers get together
16 in Wyoming, have a Judge in Wyoming sign something, and
17 that obviates Michigan's Discovery Rule which you quote in
18 your Brief as being liberal and open, and I'm supposed to
19 say that doesn't apply any more because a bunch of lawyers
20 got together in Wyoming and agreed that Michigan Courts
21 can't get this stuff under their Discovery Rules?

22 MR. MCGILL: I'm going to be very clear, Your
23 Honor. I am absolutely not making that argument.

24 THE COURT: Okay. That's--Because when I read
25 some of the pleadings, it was basically I got the

1 impression that it was saying: This Protective Order bars
2 otherwise discoverable material because we agreed in
3 Wyoming that it won't be disclosed.

4 MR. MCGILL: I'm not--

5 THE COURT: But that's not what you're saying?

6 MR. MCGILL: I am not saying that.

7 THE COURT: Okay.

8 MR. MCGILL: I am not saying that. What I'm
9 trying to say, and I'm obviously not doing it very well,
10 let--Let me just give a for example.

11 THE COURT: All right.

12 MR. MCGILL: Let's say this is a document. It
13 has a privileged, confidential--

14 THE COURT: In *Herrera*?

15 MR. MCGILL: --Bates number. In *Herrera*. I'm
16 saying this document can't be produced. The same document
17 that has the same information has already been produced to
18 Mr. Smith and Mr. Toutant.

19 THE COURT: All right.

20 MR. MCGILL: It just doesn't have the privileged
21 and confidential *Herrera* document stamp on it, and it's
22 responsive to your earlier Order.

23 THE COURT: Okay. So let me--let me--So you're
24 saying that the document that has *Herrera* confidential on
25 it, there is a--the same document that doesn't say *Herrera*

1 confidential on it and that document, you're producing?

2 MR. MCGILL: Has been produced.

3 THE COURT: Has been produced. So in effect,
4 then, all of the documents that were produced in *Herrera*,
5 if I'm understanding you correctly, have been produced?

6 MR. MCGILL: This is where we're--we're going
7 off the track--we're going off the rails a little bit
8 because in *Herrera*, there was a whole different set of
9 issues, a whole different set of Plaintiffs--or Plaintiff
10 and Defendants, whole different alleged failure mechanism,
11 and I'll point out, never a conclusive finding of fact.
12 There was never a finding by a jury that my client did
13 anything wrong.

14 THE COURT: Okay.

15 MR. MCGILL: But--So fundamentally, there are a
16 different set of documents because the Order that was
17 entered in this case required specific information
18 concerning delayed ignitions, et cetera, which we produced.

19 THE COURT: Okay. All right.

20 MR. MCGILL: We just didn't produce the
21 documents that said, "*Herrera* confidential," you know,
22 Protective Order with the Bates number from the *Herrera*
23 case.

24 THE COURT: Okay. But you produced that
25 document absent that stamp?

Exhibit B

#6
36

STATE OF MICHIGAN
IN THE CIRCUIT COURT FOR THE COUNTY OF KEWEENAW

MARY L. MATHEWS, individually, and as,
Personal Representative of the Estate of
WILLIAM H. FRABOTTA, deceased,

File No.: 17-775-NO
Hon. Charles R. Goodman

Plaintiff,

v

DOUGLAS NAKKULA d/b/a MODERN
HEATING & COOLING, JEFF WAATTI,
and TRIANGLE TUBE,

Defendants.

Phillip B. Toutant (P72992)

Attorneys for Plaintiff
105 Meeske Avenue
Marquette, MI 49855
(906) 226-2580

Joseph P. McGill (P43770)

Attorney for Defendant, Triangle Tube
Cambridge Center
38777 Six Mile Road, Suite 300
Livonia, MI 48152
(734) 742-1825/521-2379 (F)

Glenn W. Smith (P42704)

Attorney for Defendants, Nakkula & Waatti
BENSINGER, COTANT & MENKES, P.C.
122 W. Bluff Street
Marquette, MI 49855
(906) 225-1000/0818 (F)
gws@bcma.net

**ORDER CONCERNING DEFENDANTS, DOUGLAS NAKKULA
d/b/a MODERN HEATING & COOLING AND JEFF WAATTI'S,
MOTIONS TO COMPEL DISCOVERY ARGUED ON APRIL 18, 2019**

After having considered motions, briefs, oral arguments, and being otherwise advised in
the premises;


IT IS HEREBY ORDERED that:

FILED ON 7-26-19
12TH CIRCUIT COURT
KEWEENAW COUNTY,
MICHIGAN
Glenn Smith declaration *JS*

1. Triangle Tube shall produce the deposition transcript of Michael Senk, including all exhibits and the video recording of that deposition, from the *Herrera, et al. v Buckingham, et al.*, US District Court File No.: 2:15-cv-128-NDF case, forthwith; and

2. The Protective Order entered in the *Herrera, et al. v Buckingham, et al.*, US District Court File No.: 2:15-cv-128-NDF, matter shall not be a bar, defense, or exception to the Plaintiff and Co-Defendant obtaining discovery from Triangle Tube in this subject litigation.

Dated: 7/25/2019


Honorable Charles R. Goodman
Circuit Court Judge

PROOF OF SERVICE

I certify that a copy of this instrument was served upon the attorneys of record and/or all interested parties by mailing it to them at their respective business addresses as disclosed by the pleadings, with postage prepaid on the 29th day of July, 20 19. I declare under penalty of perjury, that this statement is true to the best of my information, knowledge and belief.



Court Clerk

Exhibit c

COPY

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25

STATE OF MICHIGAN

IN THE CIRCUIT COURT FOR THE COUNTY OF KEWEENAW

MARY L. MATHEWS, individually,
and as Personal Representative
of the Estate of WILLIAM H.
FRABOTTA, deceased,

Plaintiff,

-vs

File No. 17-775-NO
Hon. Charles R. Goodman

DOUGLAS NAKKULA d/b/a MODERN
HEATING & COOLING, JEFF WAATTI,
and TRIANGLE TUBE,

Defendants. /

HEARING ON MOTIONS

BEFORE THE HONORABLE CHARLES R. GOODMAN, CIRCUIT JUDGE
Special Session held in
Houghton, Michigan, Tuesday, July 23, 2019

APPEARANCES:

For Plaintiff:	PHILLIP B. TOUTANT, P72992 105 Meeske Avenue Marquette, Michigan 49855 906-226-2580
For Defendant:	GLENN W. SMITH, P42704 122 W. Bluff Street Marquette, Michigan 49855 (906) 225-1000 - For Nakkula & Waatti
For Defendant:	JOSEPH P. MCGILL, P43770 38777 Six Mile Road, Suite 300 Livonia, Michigan 48152 (734) 742-1825 - For Triangle Tube
RECORDED BY:	PAMELA L. BEGGS, CER-4072
TRANSCRIBED BY:	KATHLEEN B. VETTORI, CER-2517 Certified Electronic Recorder P. O. Box 386 Hancock, Michigan 49930 (906) 482-5487 or (906) 370-5488

1 MR. MCGILL: Thank you very much, Your Honor.

2 MR. SMITH: There was one more thing that Mr.

3 McGill and I agreed to, and that was the Order concerning

4 Defendant Doug Nakkula, Modern, et cetera's Motion to

5 Compel Discovery argued on April 18, 2019. Mr. McGill and

6 I have agreed that you may sign the Order as we had

7 originally presented it without the redlining.

8 THE COURT: Is that correct, Mr. McGill?

9 MR. MCGILL: That is correct, Your Honor.

10 THE COURT: All right, do you have that Order,

11 Mr.--

12 MR. SMITH: I do. I have a--I'll approach. The

13 front page says, "copy." It was my copy, but--

14 THE COURT: Oh, I probably--

15 MR. SMITH: You do. You do have it so far.

16 THE COURT: It would be tucked in here

17 somewhere?

18 MR. SMITH: Yeah. Yeah. You can keep that for

19 reference.

20 THE COURT: All right, and I'll find it in the

21 original of the file.

22 MR. SMITH: Okay.

23 THE COURT: I'll sign it and provide it to the

24 Keweenaw County Clerk. All right, I'll just keep the copy

25 so I'm sure that I sign the appropriate document.

Exhibit D**COPY**

1 STATE OF MICHIGAN
 2 IN THE CIRCUIT COURT FOR THE COUNTY OF KEWEENAW

3 MARY L. MATHEWS, individually,
 4 and as Personal Representative
 5 of the Estate of WILLIAM H.
 6 FRABOTTA, deceased,

Plaintiff,

6 -vs

File No. 17-775-NO
 Hon. Charles R. Goodman

7 DOUGLAS NAKKULA d/b/a MODERN
 8 HEATING & COOLING, JEFF WAATTI,
 9 and TRIANGLE TUBE,

Defendants. _____/

10 HEARING ON MOTIONS

11 BEFORE THE HONORABLE CHARLES R. GOODMAN, CIRCUIT JUDGE
 12 Special Session held in
 Houghton, Michigan, Tuesday, July 23, 2019

13 APPEARANCES:

14 For Plaintiff: PHILLIP B. TOUTANT, P72992
 15 105 Meeske Avenue
 Marquette, Michigan 49855
 906-226-2580

16 For Defendant: GLENN W. SMITH, P42704
 17 122 W. Bluff Street
 Marquette, Michigan 49855
 18 (906) 225-1000 - For Nakkula & Waatti

19 For Defendant: JOSEPH P. MCGILL, P43770
 20 38777 Six Mile Road, Suite 300
 Livonia, Michigan 48152
 21 (734) 742-1825 - For Triangle Tube

22 RECORDED BY: PAMELA L. BEGGS, CER-4072

23 TRANSCRIBED BY: KATHLEEN B. VETTORI, CER-2517
 24 Certified Electronic Recorder
 P. O. Box 386
 Hancock, Michigan 49930
 25 (906) 482-5487 or (906) 370-5488

1 only entity that is subject potentially to some exclusion
2 concerning destruction would be an insurer, and certainly
3 the party who produced the documents. So I read this by--
4 by assuming that no attorney, no matter who they
5 represented, was permitted to maintain a copy of the
6 confidential documents. So if that's the case, all of
7 those *Herrera* documents should be asunder. So I don't know
8 how they stamped "*Herrera*" if they were all destroyed.

9 MR. MCGILL: They would have been stamped, at
10 least in my client's perspective, "Triangle," and then a
11 number of--I believe, and then "protected/confidential."
12 Something along those lines.

13 THE COURT: You're saying the documents that
14 went back to Triangle?

15 MR. MCGILL: Yes.

16 THE COURT: That they produced?

17 MR. MCGILL: Yes.

18 THE COURT: But let me say this, and I'm just
19 trying to figure out, counsel, what's going on here,
20 because I'm trying to help. If Triangle produced documents
21 per *Herrera*, I would find it difficult to assume that they
22 gave away their only document and didn't keep for
23 themselves copies of those documents. In other words, they
24 went to the store clerk and said, "All of our documents
25 that are in our storeroom, just shop those out," and the

1 clerk said, "Should I maintain a copy?" "No, just get rid
2 of the originals, and we won't maintain a copy." I find
3 that difficult to fathom.

4 So when those documents would be subject to
5 destruction per this Order, all of the documents that were
6 filed with the Court or provided to other counsel would be
7 destroyed. And, of course, if Triangle Tube gave away
8 their original document and kept no copy, they would simply
9 no longer exist. Period. However, if Triangle Tube kept a
10 copy of what they provided to other counsel and to the
11 Court, Triangle Tube would still have those copies, I
12 assume.

13 That's my first dilemma.

14 My second dilemma, based upon what I've heard is
15 going back to Mr. McGill's initial statement indicating
16 that--and I agree with him, if, for example, an
17 interrogatory or request to produce said, "Give us all the
18 documents ever produced in *Herrera*," I--that would be a
19 bit, in my opinion, over broad. But then Mr. McGill went
20 on to indicate that if counsel asks for something, they'll
21 get it. And the reason why 50,000 documents were produced
22 in *Herrera* and 50,000 documents weren't produced here is
23 because the attorneys in *Herrera* asked for more documents
24 than did the parties here, because they asked for the whole
25 product line or something, as indicated by Mr. McGill.

1 So what I'm trying to figure out, counsel, is do
2 we, in fact, have some kind of a controversy here? In
3 other words, if Plaintiff or Defendant asked for additional
4 documents, whether they are provided in *Herrera* or not, I
5 got the impression from Mr. McGill, they will be produced.

6 It's simply a question of asking, if I understood you
7 correctly. But it won't be produced to simply a broad,
8 "Give us everything in *Herrera*." That's what I understood.

9 MR. MCGILL: I think that's fair, Your Honor.

10 THE COURT: All right. Now if that's the case,
11 and Mr. Smith or Mr. Toutant have additional documents or
12 categories of documents that they would request, I got the
13 impression from Mr. McGill that it will be responded,
14 whether those documents were produced in *Herrera* or not.
15 But again, I'm a little confused as to the destruction
16 issue because when I read that Protective Order, and I read
17 it over a number of times, I just assumed after reading it
18 that even you, Mr. McGill, didn't have them anymore.

19 So I guess it comes down to: Do we have a
20 controversy or do we not?

21 MR. MCGILL: I don't think we do, Your Honor. I
22 think that to date, we've been responsive with respect to
23 the records we've been required to produce pursuant to the
24 Order that was entered, I believe, in November of 2018,
25 meaning, records described in that Order from January 1st,

1 2010 forward. The search for records did not predate that
2 date.

3 THE COURT: So I gather, Mr. Smith, if you wish
4 to have additional records, whether they're *Herrera* records
5 or whether they're not *Herrera* records, then you will form
6 a question in the form that Mr. Shenk--is that his name,
7 Senk, or whatever?

8 MR. MCGILL: Senk.

9 THE COURT: --made reference to during the
10 course of his deposition, you would be provided with
11 substantially more documentation. That's what I gathered.

12 MR. SMITH: I would--Okay, I--I would hope
13 you're correct, Your Honor, in your interpretation of what
14 Mr. McGill is saying. I--The controversy we do have: You
15 asked do we have a controversy or not. I still believe Mr.
16 McGill's redlining is improper, and that's what you had
17 gotten to at our last hearing where he agreed that simply
18 because it has something to do with *Herrera*, it's not going
19 to be a defense to production.

20 THE COURT: That's--that's--I don't think, and
21 correct me again if I'm wrong, and I'm listening to
22 everything everybody is saying right now. I don't think
23 whether a document is a part of *Herrera* or not is a
24 relevant issue from what I gather. If--First of all, they
25 should be destroyed. Now if they're destroyed, they're

1 destroyed. And now we have a set of documents possessed by
2 Mr. McGill's client that you have access to per discovery.
3 *Herrera* documents, as far as I can read from this
4 Protective Order, is no longer relevant because they're
5 burned. That case is over, those documents have been
6 destroyed, and in my view, it's no longer an issue.

7 Now we have documents possessed by Triangle Tube,
8 or possessed by Modern Heating, or whoever, and they're
9 subject to discovery. I don't know, when I read this
10 Protective Order the last six times, why we're even talking
11 about *Herrera* because according to what I've read, all the
12 *Herrera* documents per the Protective Order that was signed
13 by the Federal Judge in Wyoming and signed by all the
14 counsel involved in that case destroyed them. So what are
15 we talking about? *Herrera* documents, I suppose we could
16 look through landfills or whatever, or shredders. So
17 what's the relevance about *Herrera* because they should no
18 longer exist, including the documents possessed by Mr.
19 McGill's office, if any. That's the way I read this. I've
20 read it to counsel. I'm giving counsel the opportunity to
21 tell me I was wrong, but I haven't heard that.

22 MR. SMITH: I would agree with your reading,
23 Your Honor. I think the Order that we proposed last time
24 is acceptable without the redlining. I imagine that's what
25 you'll consider sometime after today. I take it you're

1 taking these things under advisement?

2 THE COURT: I will take them under advisement
3 and probably rule on them after we complete our vast
4 discovery mission.

5 MR. SMITH: All right. Okay. That's the
6 controversy. He, Mr. McGill, is redlining in information
7 is that the *Herrera* documents do still exist.

8 THE COURT: They don't exist.

9 MR. SMITH: Perfect.

10 THE COURT: From what I understand, the *Herrera*
11 documents don't exist, based upon the Protective Order and
12 the terms set forth in the Protective Order. If they do
13 exist, it's contrary to the Protective Order, as far as I
14 can read. So if *Herrera* isn't a relevant factor, and I'm
15 more than happy to listen to somebody tell me that it is,
16 but if it isn't a factor, what's the relevance of that case
17 at this point in time?

18 MR. MCGILL: Your Honor, just for purposes of
19 the record, the paragraph eight in section four of the
20 Protective Order does talk about a party using its own
21 records, so we--

22 THE COURT: It says a party, but it doesn't say
23 the attorney. I realize that Triangle Tube has the right
24 to use their records. They're their records. They
25 certainly don't have to destroy the original of their

1 records. They're--Those are business records. They're
2 entitled to keep them, and they're entitled to use them in
3 whichever way they deem appropriate.

4 This Order does not say that Triangle Tube has to
5 destroy its own records, or any other party who was
6 involved in that *Herrera* case has to destroy theirs, but it
7 doesn't say that the attorneys keep those records, in other
8 words, for litigation purposes. So if Mr. Smith or Mr.
9 Toutant ask for a Triangle Tube record, they can't say, as
10 far as I'm concerned, that it's *Herrera* because *Herrera* is
11 over, and those records have been destroyed. Triangle
12 Tube, in this case, can use those records. They're not
13 violating any Protective Order if they do. But again,
14 they're subject to discovery just like any other relevant
15 information is subject to discovery under the Rules of
16 Discovery. That's the way I look at this. And I read that
17 Protective Order on multiple occasions, and I saw nothing
18 that tells me anything differently, assuming--That's why I
19 asked you if the *Herrera* case was still pending, or if
20 we're in the appeal period. If we were in the appeal
21 period, we'd have a different issue. We'd have to wait it
22 out. But none of that seems to be particularly relevant,
23 so I don't know why we're talking about that case.

24 Does that answer the question?

25 MR. SMITH: Almost. Ninety-nine percent. One

1 more point of clarification. If Mr. Senk, for example,
2 should run into a cache of documents that we have requested
3 and they happen to be stamped "Herrera" at the bottom, I
4 take it because Triangle Tube can still have these records,
5 as we've indicated. Now if it should be stamped
6 "Triangle"--

7 THE COURT: Well, they wouldn't be stamped
8 "Herrera" on the bottom because they've been destroyed.
9 They might have a copy of what they provided.

10 MR. SMITH: Okay. An original?

11 THE COURT: Yes.

12 MR. SMITH: An original. All right. Very good.
13 Your ruling's clear, Your Honor.

14 THE COURT: I don't see how any document would
15 have Herrera stamped on the bottom, because those were to
16 be destroyed. And if they're not, that's something maybe
17 that should be taken up with the Federal District Court in
18 Wyoming. Not me.

19 So based upon that, I would expect counsel to be
20 able to submit a Court--an Order. I'm going to give Mr.
21 McGill time. I think he's looking at that Protective
22 Order, and I'm going to give him opportunity to do that in
23 case he sees something that I--this Court didn't see,
24 because I don't want this coming up again next week.

25 MR. MCGILL: This is duplicative, Your Honor,



UNITED STATES
POSTAL SERVICE®

Click-N-Ship®

E

usps.com 9470 1036 9930 0048 1586 90 0255 0000 0058 200-1
\$25.50
US POSTAGE
Flat Rate Env



01/17/2020

Mailed from 94710 062S00000000310

PRIORITY MAIL EXPRESS 2-DAY™

BERNARD R CUZZILLO
BERKELEY RESEARCH COMPANY
600 ADDISON ST
BERKELEY CA 94710-1920

Scheduled Delivery Date: 01/21/20

0007

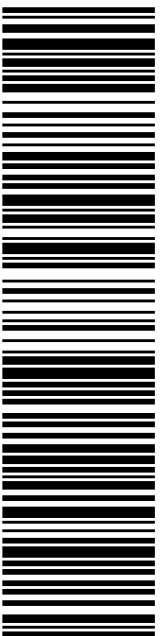
C015

WAIVER OF SIGNATURE

SCHEDULED DELIVERY 3:00 PM

SHIP TO: KELLY H RANKIN
UNITED STATES DISTRICT COURT
2120 CAPITOL AVE
STE 2204
CHEYENNE WY 82001-3621

USPS TRACKING #



9470 1036 9930 0048 1586 90

X